No. 292

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

THE ATLANTIC REFINING COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

Amicus Curiae Brief of Champlin Petroleum Company

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Brief concurred in by the
following marketing oil companies:

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JENNEY MANUFACTURING COMPANY, INC.
KERR-McGEE OIL INDUSTRIES, INC.
LEONARD REFINERIES, INC.
SKELLY OIL COMPANY
SUNRAY D-X OIL COMPANY
TENNECO COMPANY
THE SHAMROCK OIL AND GAS CORPORATION

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DIRECT INTEREST OF AMICUS

The order on review reaches far beyond the immediate parties to this case. It not only finds the use, by Goodyear and Atlantic, of the TBA sales commission plan to be an "unfair method of competition"; it completely outlaws this type of plan for *all* marketing oil companies. Specifically Goodyear is commanded to cease and desist from:

> "Entering into or continuing in operation or effect any contract, agreement, or combination, express or implied, with The Atlantic Refining Company or with ANY OTHER MARKETING OIL COMPANY whereby Goodyear, directly or indirectly, pays or contributes anything of value to any such marketing oil company in connection

with the sale of TBA products * * *." 58 FTC 309, 370 (1961).

In related litigation Firestone[1] and B. F. Goodrich[2] have similarly been ordered to withdraw their sales commission plans from, not only the parties who were heard by the Commission, but also "any other marketing oil company." Champlin Petroleum Company currently operates under sales commission plans with both Goodyear and Firestone. Thus it, and similarly the other marketing oil companies who concur in this brief, have a vital and immediate interest in the proper decision of this case.

Champlin Petroleum Company, Fort Worth, Texas, is a relatively small marketing oil company which has operated exclusively on the TBA sales commission plan since 1955. For over thirty-six years Champlin has found it prudent, if not commercially essential, to provide a TBA program for its sales outlets. The other marketing oil companies who concur in this brief have also operated on the TBA sales commission plan for a number of years and have the same vital interest as Champlin in the case at bar.

The necessary result of upholding the Commission's orders would be to deny the sales commission plan to all oil companies, small, medium, and large, including Champlin and the other marketing oil companies con-

[1]Review pending in *The Firestone Tire & Rubber Company v. F.T.C.*, No. 18969, and *Shell Oil Company v. F.T.C.*, No. 18967, U. S. Court of Appeals, 5th Cir., argued in January, 1964, and awaiting decision

[2]Reversed in *Texaco Inc. & B. F. Goodrich Co. v. F.T.C.*, 336 F.2d 754 (D.C. Cir. 1964), pet. for cert. pending in No. 635, October Term, 1964.

curring in this brief. Hopefully the views herein expressed, based as they are upon years of experience with TBA programs, will be of some assistance to the Court in its search for the soundest resolution of the issue before it.

ARGUMENT

The Commission's Action Is a Promulgation of Its Philosophy — Not an Expert Conclusion Based on Findings Supported by Evidence

From the fact that the Commission's orders undertake to proscribe the TBA sales commission plan for an entire industry, it is obvious that the real attack has only a philosophical, not an evidentiary, basis.

Champlin and the other concurring companies were not made parties in any of the litigated cases, and the Commission put virtually no evidence in the respective records pertaining to these oil companies. The Commission did not call any of the executives or dealers of these companies as witnesses, and offered *no* evidence whatever regarding the "characteristics and competitive effects of the sales commission plan as engaged in by them." Yet, the Commission, in its several opinions, stated that "characteristics and competitive effects" were the key inquiries in evaluating the legality or illegality of the sales commission plan as engaged in by the respondent companies. *A fortiori*, the Commission made no findings or conclusions as to Champlin and the other nonrespondents.

The surprising industry-wide indictment of the court below "that the service station dealer is

more of an economic serf than a [free] business man" is the dominant theme pervading the Commission's opinions in these cases. But, if the private enterprise system in this country had reached an ebb that low — and certainly it has not — then the prohibition of the TBA sales commission plan would hardly be the answer. Indeed it would aggravate the problem.

The Competitive Effects of the Sales Commission Plan Must Be Evaluated in the Context of the Realistic Market Alternatives

Every marketing oil company in America provides a TBA program for its dealers because the traveling public demands it. It is an unquestioned fact that a marketing oil company cannot effectively compete in the retail distribution of petroleum products without a definite and well organized TBA program. And, of equal importance, a company without such a program could not compete in the increasingly difficult effort to obtain and even to retain dealers. Anyone who asserts that the service station dealer of today is a "mere economic serf" is far removed from the very real problem of finding and keeping good dealers. The demand for them greatly exceeds their supply.

It is equally beyond dispute that there are only two known TBA plans available to the marketing oil company channels of distribution. Under the one, the marketing oil company buys TBA and sells it to its dealer-customers — this is known as the "purchase-resale plan." Under the other the marketing oil company, for a reasonable sales commission, promotes the TBA

manufactured and distributed by tire manufacturers who sell direct to the oil company sales outlets — this is known as the "sales commission plan." In point of fact the essential difference is that the purchase-resale plan involves the marketing oil company much more deeply in the TBA business, which is really incident to its principal product line.

Champlin has had substantial experience with both plans and so have several of the other concurring companies. While many of the larger oil companies have been able to operate successfully on the TBA purchase-resale plan, Champlin and many of the other smaller companies have concluded, on the basis of practical experience with both, that the sales commission plan is administratively and economically more successful for them and their dealer-customers.

The practical effect of the Commission orders is to direct all oil companies, regardless of their size and resources, to utilize the purchase-resale plan, contrary to their best business judgment and despite the lessons of their past experience. Competition will be decreased by reducing the methods of competing; greater integration will be inevitable. There is simply no rational foundation for the Commission's hope that its compulsive narrowing of the choice of TBA programs will increase the volume of business done by competing local TBA jobbers or by smaller tire manufacturers. Because the Commission's restrictive order will adversely affect all competitive segments concerned, ultimate injury to the consumer is inevitable.

It may well be possible for Gulf or Esso to operate

more economically and successfully on the purchase-resale plan (which they have elected to do) because of their greater size, resources, and national distribution systems. But Champlin, and at least some of the other regional oil companies, cannot operate as economically or successfully under the purchase-resale plan as under the sales commission plan. They have learned this by experience. And to speculate that the dealers of those companies which choose the purchase-resale plan will be free business men while the dealers of those companies which choose the sales commission plan will be economic serfs is to weave a quilt of fantasy from the fine-spun yarn of economic theory. On this subject, as with so many others, "A page of experience is worth a volume of logic."

Since the Commission is asking this Court to hold unfair our method of competing, we ask careful consideration of our problem in competing. All factual statements made in this brief are based on the sworn testimony of Mr. R. B. Thomas, a Senior Vice President of the company, who testified as a witness in the Firestone-Shell proceedings. His testimony is not in the record before this Court but neither is any other evidence concerning Champlin. Yet Goodyear is ordered to cease and desist its sales commission program with Champlin.

Champlin is one-twentieth the size of such majors as Shell, Gulf, Texaco, and Standard Oil, and is considerably smaller even than a number of regional companies.

Unlike the bigger companies, Champlin markets in

less than a dozen states. The bigger companies each have many thousands of service stations, but Champlin markets in a much more limited area and on a much smaller scale.

Champlin, beginning in 1929, entered TBA marketing as a competitive necessity in its own interest and in the interest of its independent petroleum dealers. For a period of years, it had an unusually varied trial-and-error experience on purchase-resale, with large and small tire manufacturers, and a number of battery and accessory manufacturers, on "standard" brands and on "private" brands. It went through all the headaches and financial problems of selecting the right items of TBA, in the right quantities, warehousing, and selling and delivering to its petroleum outlets. The purchase-resale plan required more personnel, more distribution facilities, more capital investment and current funds, and more know-how in the TBA business itself. As a small company Champlin found these distinct competitive disadvantages.

In early 1950 Champlin even tried a dual arrangement, partly purchase-resale (Dayton) and partly sales commission (U. S. Rubber). By 1955 Champlin's mind was made up; it had enough of purchase-resale and from then to date it has been exclusively on sales commission and is doing a good job — beneficial to its dealers and the public.

Champlin has little interest in TBA as such, regardless of brands or sources, or purchase-resale or sales commission. Its principal concern is with the sale of more petroleum products through its outlets; and good

TBA with good merchandising programs and efficient service help achieve that goal. In 1957 the gross TBA sales commission revenue of Champlin was 1/10 of 1% of its gross revenue from the sale of petroleum products; the dollar amount of sales commission earned and received was less than Champlin's TBA expense.

Champlin does not want to involve itself more deeply in TBA than at present. It could afford to do so only at the expense of other aspects of its business. It wants to continue to recommend and promote TBA of its choice to Champlin outlets and to offset the expense of that program in whole or in part by a sales commission. But it would be business suicide to ignore TBA. If the sales commission plan is outlawed, Champlin necessarily but reluctantly would revert to the purchase-resale plan and thus get into TBA. "with both feet." This would mean more investment in inventories, far more warehouse space, more sales personnel, less liberal credit programs, and could easily divert concentration from its bread and butter business—petroleum products. Thus Champlin's ability to grow and to expand its distributive outlets could be impaired as the direct result of an administrative fiat. The government itself may well have made this company a less effective competitor.

Certainly the antitrust laws do not compel a company within an industry to confine its distribution only to its own manufactured products. No one would contend that it is illegal for an oil company to provide TBA for its sales outlets. The Commission professed

to be examining into the sales commission plan as a "particular method" of distributing TBA products but then in effect condemned it by means of an alleged evil which it asserted existed independently of that particular method of distribution. The reasoning utilized by the Commission, as well as by the court below, would be equally applicable to the sale of any product by a marketing oil company to one of its service station dealers. Specifically, the Commission said:

> "The issue here is the legality of respondents' use of a *particular method* of distributing TBA products. Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing INDEPENDENTLY OF THE PARTICULAR METHOD *of distributing or sponsoring TBA* used by Atlantic."

And the court below also feared overpersuasion:

> "The heart of this case is the economic power Atlantic possesses over its service station dealers."

Assuming, for the sake of argument only, that there is danger of undue sales influence by all marketing oil companies over all of their dealers, is there any reason to believe that imposition on the dealers will be more significant as to products sponsored but not purchased and resold than it would be as to products purchased or manufactured by the oil company? Of course not. Coercion is wrong. If coercion exists, it should be

stopped. But limiting TBA distribution methods would not be a remedy for coercion even if it did exist.

And if, as the court below asserts, the *heart* of the case is the "economic power *Atlantic* possesses over *its* service station dealers", then by what right does the Trade Commission limit *Champlin's* right to do business with *its* dealers? We do not know whether Atlantic possesses economic power over its service station dealers that makes them "serfs." We do know Champlin possesses no such power nor is there any evidence in this record, or any other record, that Champlin has or could have coerced its dealers or done anything else wrong. There is no evidence of "tying" (a legal concept which the Commission mentions but does not rely upon since there is no tying here involved); there is no evidence that Champlin's leases or other contracts pertaining to any commodity have any unlawfully restrictive clauses or could be or are used to abuse any service station dealer. Thus the Commission's fallacy in sounding the death knell for the sales commission plan throughout an industry — actually because of a philosophical bias against it — is best exposed in the light of the obvious fact that Champlin has been put out of a particular business without trial and without an adjudication based on an evidentiary record. Is the right to do business no longer even that substantial?

The degree of success or failure of Champlin's sales promotion activities under its TBA sales commission plan ought not to be the determinant of legality or illegality but, if it were, the cold fact is that over seventy percent of the TBA going through Champlin's

outlets was nonsponsored TBA even after years of promotional effort on sponsored TBA. What stronger evidence could there be that Champlin's dealer-customers are "free" and not "serfs"? Furthermore not a single Champlin outlet handles sponsored TBA exclusively; many handle nonsponsored TBA exclusively.

CONCLUSION

Champlin believes that the sales commission plan of TBA distribution meets a legitimate marketing oil company need — particularly for the smaller marketing oil companies, that it is not an "unfair method of competition", and that its prohibition would not eliminate a single one of the supposed evils of which the Commission and the court below have accused the marketing oil industry. Denial of Champlin's freedom to use the sales commission TBA plan will injure, not promote, competition. The antitrust laws do not compel that result.

The final decree of the Court of Appeals for the Seventh Circuit should be set aside with instructions to remand to the Federal Trade Commission for dismissal of its complaint.

Respectfully submitted,

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The Amicus views and positions urged herein by Champlin Petroleum Company are concurred in by the marketing oil companies by and through their respective attorneys listed below:

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TENNECO OIL COMPANY
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THE SHAMROCK OIL AND GAS CORPORATION
Amarillo, Texas
By Avery Rush Jr.

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing brief has been served on the Solicitor General and on The Atlantic Refining Company by mailing same on February 3, 1965, to the Solicitor General of the United States, Department of Justice, Washington, D.C., and to Frederic L. Ballard, Jr., 1035 Land Title Building, Philadelphia, Pennsylvania 19110, one of the attorneys for The Atlantic Refining Company.

CECIL E. MUNN